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April 15, 1996

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FEDERAL COMMUNICATIONS COMMISSION
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BY HAND

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

CC Docket No. 96-59
Comments of the Virginia
PCS Alliance, L.C.

Dear Mr. Caton:

Transmitted herewith on behalf of the Virginia PCS Alliance, L.C. are an original and four copies of comments in the above-referenced proceeding.

If you have any questions concerning this filing, please call me.

Very truly yours,

Charles H. Carrathers III

Charles H. Carrathers, III

Enclosure

cc: Lauren Carbaugh, Esq.
Warrren Catlett, Esq.

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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Amendment of Part 22)

Commiss)

PCS Com)

Commerc)

Spectrum)

Amendmen)

Cellular PC)

DOCKET FILE COPY ORIGINAL

WT Docket No. 96-59

GN Docket No. 90-314

COMMENTS OF THE VIRGINIA PCS ALLIANCE, L.C.

These Comments are filed on behalf of the Virginia PCS Alliance, L.C. ("the Alliance")^{1/} pursuant to the Federal Communications Commission's Notice of Proposed Rulemaking (NOPR) dated March 20, 1996.

^{1/} The Alliance is a limited liability company organized under Virginia law. Each of the alliance's ten members is either a "rural telephone company" (as defined in Section 24.720(e) of the Commission's Rules) or a holding company whose subsidiaries include a rural telephone company. The members of the Alliance are as follows: Buggs Island Telephone Cooperative; CFW Communications Company; Hardy Telecommunications, Inc.; Highland Telephone Cooperative; MGW Communications, Inc.; New Hope Telephone Company; North River Telephone Cooperative; Pembroke Telephone Cooperative; Peoples Mutual Telephone Company; and R&B Communications, Inc. The Alliance has an application pending with the Commission under which the Alliance would receive a partitioned PCS license from PCS PrimeCo, L.P. Moreover, the Alliance PCS Consortium -- a consortium of the ten companies listed above -- is bidding on the C Block auction for certain BTAs and will transfer any licenses it wins to the Alliance. Therefore, the Alliance has an interest in many of the issues to be decided in this proceeding.

The NOPR seeks comment on many significant issues pertaining to the Commission's competitive bidding and ownership rules for PCS broadband licenses in the D, E and F frequency blocks, including many issues affecting rural telephone companies. These issues are especially important to the Alliance, because the Alliance's members include almost all of the rural telephone companies operating in Virginia.^{2/} The Alliance is hopeful that the Commission will adopt rules that will enable and encourage rural telephone companies to participate in the D, E and F block auctions, because such companies are best positioned to bring advanced telecommunications services to rural areas throughout the United States.

Although the Alliance will briefly address every issue raised in the NOPR, the two most important issues for the Alliance are (1) the definition of "small business" for purposes of bidding in the F block auction, and (2) the Commission's proposed changes to the cellular/PCS cross ownership rules. These issues are discussed in sections 2 and 6, respectively.

Discussion

1. Race and Gender-Based Preferences

The Alliance agrees that the present record in support of the Commission's race-based provisions for the F block auction is insufficient to satisfy the strict scrutiny standard adopted in Adarand. In addition, the Alliance agrees with the Commission's tentative conclusion that the present record in support of its gender-based F block rules may be insufficient to satisfy the intermediate scrutiny standard.

^{2/} See note 1, supra.

As noted in paragraph 26 of the NOPR, Congress and consumers expect the Commission to promote the rapid development of PCS. This expectation, however, will be frustrated if the Commission were to conduct extensive proceedings in an attempt to support race and gender-based preferences. Moreover, the delay resulting from such proceedings would do more harm than good, as F block licensees would not be able to begin constructing their PCS systems until long after other licensees have entered the market. Finally, the Alliance and likely other companies that want to offer PCS services have planned to aggregate 10 MHz licenses with their existing licenses in order to fully compete in the wireless market, and any further delay of the 10 MHz auctions will put the Alliance and similarly-situated companies at a competitive disadvantage.

Given the above comments, the Alliance believes that the Commission should modify its F block rules to make them race and gender-neutral and conform them to the Commission's C block rules. In developing its C block rules, the Commission properly balanced a variety of conflicting interests and public policy choices regarding race and gender-based preferences. These same interests and policy choices are presented here; therefore, the Commission should amend its F block rules to conform with the C block rules. Moreover, the Commission's C block rules were affirmed recently by the D.C. Circuit Court of Appeals, therefore any revised F block rules that conform to the C block rules should withstand any court challenges, and the F block auction would be able to proceed expeditiously.

Finally, the Commission "should simply allow any qualified C block bidder to bid on F block licenses."^{3/} This approach is easy to administer, and also would be less susceptible to any court challenges for the reasons stated above.

2. Changes to Small Business and Rural Telephone Company Definitions

a. Small Business

The Alliance agrees with the Commission's proposal to keep the current small business definition for the F block -- the same definition used for the C block -- to allow C block small business licensees to benefit from the small business provisions of the F block.^{4/} The Alliance, however, believes that the value of the C block license should not be a part of any financial calculation used to determine eligibility or small business status in the 10 MHz auctions. C block licensees who have planned to aggregate spectrum should not be prevented from doing so merely because they were successful in the C block auction.

Furthermore, the Alliance believes that any change to the current definition of "small business" be broadened to include rural telephone companies that maintain their entrepreneurial status. In this way, the Commission would encourage even greater participation by entities most likely to bring advanced wireless services to rural areas.

Finally, the Alliance notes that some companies qualifying as a small business for the C block auction might not qualify as a small business for the F block auction because of normal business growth occurring between the C and F block auction dates. These companies should not lose their small business eligibility for the F block auction, especially

^{3/} See page 16 of the NOPR.

^{4/} See page 23 of the NOPR, ¶ 50.

where this loss of eligibility was caused, in part, by the many unanticipated delays in the auction process. Accordingly, the Alliance proposes that any small business that participated in the C block auction be allowed to participate in the F block auction as a small business where such company exceeds the gross revenue requirements due to business growth. In this way, small business bidders in the C block auction who planned to participate in the 10 MHz auctions and aggregate spectrum need not be penalized by delays outside their control. The Commission could require all applicants falling within this exception to file an appropriate certificate, and these applicants would, of course, be subject to the Commission's post-auction audits.

b. Rural Telephone Company

The Alliance believes that the Commission is not required to change -- nor should it change -- its definition of rural telephone company to conform with the definition of rural telephone company found in the Telecommunications Act of 1996 ("the Act"). There is no evidence that Congress intended the Commission to change its definition; in fact, the evidence suggests otherwise. At the time the Act was being written and debated, the C block auction was underway and Congress was aware of the Commission's definition of rural telephone company as it applied to that auction. If Congress intended to change the definition "midstream" during the auction, it would have said so. Moreover, many rural telephone companies have relied on the Commission's definition not only to participate in the auction but to negotiate and enter into partitioning plans. Here again, if Congress intended to upset these arrangements and impair the ability of companies to rely on the Commission's existing definition, it would have stated so.

Finally, the Act's definition of rural telephone company appears to have been drafted only for the new provisions of the Act. Indeed, even the Act itself recognizes different classes of rural telephone companies. For example, subsection 251(f)(1) of the Act exempts "rural telephone companies" from certain interconnection obligations, whereas subsection (f)(2) allows "rural carriers" to petition for a suspension or modification of interconnection obligations. Thus, Congress itself recognizes that different classes of telephone companies -- "rural telephone companies" and "rural carriers" -- should be treated differently for different purposes. Accordingly, Congress could not have intended that the Act's definition of rural telephone company be applied in all instances.

3. Extending Small Business Provisions to D and E Blocks

The Alliance agrees with the Commission's tentative conclusion to extend installment payment plans to small businesses bidding on the D and E blocks. As noted by the Commission, this proposal could increase the chances for all small businesses to win a 10 MHz license, and would also increase the opportunity for current CMRS licensees to aggregate spectrum and thus offer advanced services.

The Alliance also proposes that the Commission consider extending the installment payment plans to all rural telephone companies bidding in the D, E and F block auctions. As noted above, the Alliance believes that extension of these benefits to rural companies would encourage even greater participation by entities most likely to bring advanced wireless services to rural areas.

Finally, the Commission should consider extending all other preferences -- not just installment payment plans -- to small businesses and rural telephone companies bidding in the

D and E blocks. In this way, the Commission would further increase the chances for all small businesses to win a 10 MHz license, and would further increase the opportunity for current CMRS licensees to aggregate spectrum.

4. Adjusting for Lower Values of 10 MHz Licenses

The Alliance believes the Commission should not adjust the terms of its installment financing provisions or any other preferences to reflect the alleged "lower" value of the 10 MHz licenses. First, the Commission's upfront payment formula already has a built-in adjustment mechanism because it is based on a "MHz-pop" calculation, and this built-in adjustment will result in lower upfront payments relative to the payments for the 30 MHz licenses. Second, as noted in paragraph 55 of the NOPR, the winning bids for the 10 MHz licenses *could* be lower than those for the 30 MHz licenses, but no one can be certain at this time whether the winning bids will in fact be lower. Indeed, many expected that the bids in the C block auction would be significantly lower than the bids in the A and B block auction on a per-pop basis, but this has not been the case. No one can estimate how the 10 MHz bidding will develop, and this is especially true given that existing cellular and PCS licensees will seek to fill in the "holes" within their service territories with 10 MHz licenses, and given that unsuccessful bidders in the previous auctions will view the 10 MHz auctions as their "last chance" to acquire PCS spectrum.

5. Rules Regarding the Holding of Licenses

The Alliance agrees with the Commission's proposal to amend its holding requirement to allow all F block licensees to transfer their licenses within the first three years to an entity that qualifies as an entrepreneur. Moreover, the Alliance believes that if the Commission

extends its small business provisions to bidders in the D and E block auctions, then the relaxed transfer rules should apply to these licenses as well. The Commission would be able to discourage speculators and sham bidders in the auctions by applying its unjust enrichment provisions to the 10 MHz licensees.

6. The Cellular/PCS Cross Ownership Rule

The Alliance agrees that the Commission should simplify its rules by eliminating its PCS/cellular ownership limitations and its 40 MHz PCS spectrum cap in favor of a single 45 MHz CMRS spectrum cap. As discussed below, however, the Alliance believes this rule should be further modified to ensure that the spectrum cap is applied in such a way so as to place MTA licensees and BTA licensees on equal footing. The current rules fail to do so, and thus restrict competition between MTA and BTA licensees within certain markets.

To illustrate how the current rules restrict competition, let's examine a case where (1) Company A is a major telecommunications carrier that holds a 30 MHz license for MTA-1, which includes 4 million pops; (2) Company B is a small rural telephone company that holds a 30 MHz license for BTA-1, which includes 100,000 pops; and (3) BTA-1 is within MTA-1. Let's further assume that a cellular system is within BTA-1, and that the system's CGSA includes 11,000 pops. Under the Commission's current rules, Company A can own that cellular system because there is no "significant overlap" of the CGSA and the MTA-1 service area due to the large size of MTA-1. Indeed, Company A can own a number of cellular systems within its MTA without creating a significant overlap. By contrast, Company B is precluded from owning the cellular system within BTA-1, *but only because the smaller size of BTA-1 results in a significant overlap with the cellular system's CGSA.*

Please note that Company A -- typically a larger, well-financed telecommunications company -- has a significant advantage over Company B with respect to competition within any given CGSA, because Company A is permitted to own up to 55 MHz of spectrum within that CGSA. This is because the Commission's cellular/PCS overlap rule is much more restrictive when applied to a BTA than when applied to an MTA. The Alliance does not understand the economic justification for such a result, especially since Company A has greater financial resources than Company B and thus has more opportunities to control a given cellular market. For these reasons, the Alliance urges that the Commission's rules be modified so that MTA pops are used in calculating significant overlap for BTA license holders who also own or acquire cellular systems within that BTA. With this modification, Company B in our above example can have the same opportunities as Company A -- at least on a prospective basis -- in providing advanced wireless services.

7. The Cellular Attribution Standard

The Alliance agrees with the Commission's proposal to conform the F block attribution standards with those adopted for the C block auction. Specifically, the Alliance agrees that the 40% attribution standard should be applied to small businesses and rural telephone companies in the F block auction.

Furthermore, the Alliance proposes that the Commission adopt a "controlling interest" test for cellular attribution that would supplement the 40% attribution test. To help explain this proposal, let's examine two rural telephone companies that each own a 30% limited partnership interest in a cellular system and that decide to form a consortium to jointly bid on a PCS license. Given their limited cellular interests, the companies have no control over the

cellular system either individually or collectively, but they are required to divest part of their interests to meet the Commission's 40% threshold. This result, however, has no economic justification, and can be avoided if the Commission adopts a "controlling interest" test to supplement its 40% attribution test.

8. Ownership Disclosure Provisions

The Alliance supports all the changes to the disclosure provisions proposed by the Commission in its NOPR. Specifically, the Alliance agrees that a certification in lieu of audited financial statements is appropriate, and that most ownership information could be made available upon request either during or after the auction. In this way, small businesses need not spend significant time and resources compiling all the information currently required for Form 175. The Alliance, for example, spent thousands of dollars and many weeks collecting information and preparing its Form 175 for the C block auction. The Alliance believes a more streamlined approach will encourage other small businesses to enter the auctions. At the same time, the Commission's post-auction audits and severe penalty provisions will help ensure that all bidders comply with all bidding rules.

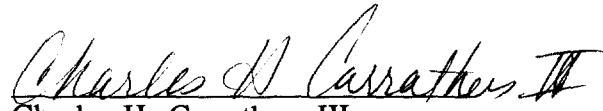
9. Auction Schedule

The Alliance agrees with the Commission's tentative conclusion to auction the D, E and F frequency blocks concurrently in simultaneous multiple round auctions. The Alliance intends to bid for certain 10 MHz licenses to aggregate spectrum as quickly as possible and thereby bring advanced wireless services to the rural areas of Virginia. The Alliance needs to aggregate this spectrum as quickly as possible to compete with other licensees and to bring

advanced services to the market quickly; therefore, the Alliance urges the Commission to begin the concurrent auctions as soon as possible.

Respectfully submitted,

THE VIRGINIA PCS ALLIANCE, L.C.

A handwritten signature in cursive script, reading "Charles H. Carrathers III". The signature is written in dark ink and is positioned above the printed name and title.

Charles H. Carrathers III
Counsel

Date: April 15, 1996

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